No. 87-1241

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1987

COMMONWEALTH OF PENNSYLVANIA,

Petitioner

v.

UNION GAS COMPANY,

Respondent

On Writ Of Certiorari
To The United States Court of Appeals
For The Third Circuit

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Whether amendments to a definitional section of the Superfund Act, which make no mention of the Eleventh Amendment and which refer to State liability only in narrow circumstances not applicable here, contain the unmistakable expression of Congressional intent necessary to override the Eleventh Amendment?

2. Whether Congress, acting under the Commerce Clause, may affect the States' Eleventh Amendment immunity only if States waive their immunity by continuing to operate in the federally regulated sphere?

3. Whether a State may be found to have knowingly and voluntarily waived its Eleventh Amendment immunity because, years earlier, it operated in what later became a federally regulated sphere?

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OPINIONS BELOW

The second opinion of the Court of Appeals (Pet. App. 1a-73a) is reported at 832 F.2d 1343 (1987). The first opinion of the Court of Appeals (Pet. App. 74a-138a) is reported at 792 F.2d 372 (1986). The opinion of the District Court (Pet. App. 139a-158a) is reported at 575 F.Supp. 949 (1983).

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on November 3, 1987, and the petition for certiorari was filed within 90 days thereafter. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Eleventh Amendment to the United States Constitution provides:

> "The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any Foreign state.

2. Section 101(b) of the Superfund Amendments and Reauthorization Act of 1986, Pub.L. No. 99-499, 100 Stat. 1613, 1615 (1986)("SARA"), provides:

> STATE OR LOCAL GOVERNMENT LIMITATION -- Paragraph (20) of section 101 of CERCLA (defining "owner or operator") is amended as follows:
>
> 1) Add the following new subparagraph at the end thereof;
>
> "(D) The term 'owner or operator' does not include a unit of State or local government which acquired ownership or control involuntarily through

bankruptcy, tax delinquency, abandonment, or other circumstances in which the government involuntarily acquires title by virtue of its function as sovereign. The exclusion provided under this paragraph shall not apply to any State or local government which has caused or contributed to the release or threatened release of a hazardous substance from the facility, and such a State or local government shall be subject to the provisions of this Act in the same manner and to the same extent, both procedurally and substantively as any governmental entity, including liability under section 107."

2) Amend clause (iii) of subparagraph (A) to read as follows: "(iii) in the case of any facility, title or control of which was conveyed due to bankruptcy, foreclosure, tax delinquency, abandonment, or similar means to a unit of State or local government, any person who owned, operated, or otherwise controlled activities at such facility immediately beforehand."

STATEMENT OF THE CASE

This case began with a complaint filed in the United States District Court for the Eastern District of Pennsylvania in which the United States sought to recover from Union Gas Co. the costs incurred to clean up coal tar which had seeped into a creek. Pet. App. 10a. Suit was brought pursuant to Sections 104 and 107 of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or Superfund), 42 U.S.C. §§9604, 9607. Pet. App. 10a. Union Gas filed third party claims against the Commonwealth of Pennsylvania and a Pennsylvania municipality, the Borough of Stroudsburg.[1] Pet. App. 10a, 79a.

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[1]The Borough is not a party to this appeal. Pet. App. 80a n.3.

The District Court dismissed the claim on Eleventh Amendment grounds.[2] Pet. App. 158a. Initially, the Court of Appeals affirmed (Pet. App. 118a), but following remand from this Court to reconsider the question in light of intervening amendments to CERCLA, the Third Circuit reversed. Pet. App. 73a.

1. The pleadings disclose that predecessors of Union Gas owned and operated a facility which produced coal tar as a by-product of its operation. Pet. App. 76a-77a. Long after the plant was closed the Commonwealth acquired portions of Union Gas' land and, through

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[2]Following the dismissal, the United States filed an amended complaint, Union Gas filed a new third party claim, the Commonwealth moved to dismiss and the District Court dismissed the third party claim, relying on its initial opinion. Pet. App. 81a.

the Borough, also acquired easements near a creek for flood control. Pet. App. 9a, 76a-77a. In the 1950's, the State, together with the Army Corps of Engineers, dug levees, erected dikes and changed the flow of the creek to aid in flood protection. Pet. App. 77a. In October of 1980, the State again was engaged in excavation along the creek when coal tar began to seep into the water. Pet. App. 77a.

The Environmental Protection Agency (EPA) found that the coal tar was a hazardous substance thus triggering the protections of CERCLA. Pet. App. 77a. The Commonwealth in cooperation with federal authorities cleaned up the spill. Pet. App. 9a. After reimbursing the Commonwealth for its costs, the

United States sued Union Gas.[3] Pet. App. 9a-10a.

The District Court concluded that the third party claim was barred by the Eleventh Amendment because CERCLA lacked clear language eliminating the States' immunity. Pet. App. 151a-152a. Following a settlement between the United States and Union Gas, Union Gas appealed dismissal of its third party claim. Pet. App. 11a.

2. In its first opinion, the Court of Appeals agreed with the District Court. The court found in CERCLA, as it read at that time, no clear language overturning Eleventh Amendment immunity. The legislative history similarly was

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[3]The United States alleged that it had spent $1,400,000 on the clean-up and sought recovery from Union Gas for $720,000. Pet. App. 81a.

silent on the subject. The Court of Appeals affirmed.

3. Union Gas filed a petition for certiorari and soon thereafter CERCLA was amended by the Superfund Amendments and Reauthorization Act of 1986, Pub. L.No. 99-499, 100 Stat. 1613 (1986) (SARA). Eventually, the Court vacated the judgment of the Court of Appeals and remanded the case for reconsideration in light of SARA. Union Gas Co. v. Pennsylvania, No. 86-597 (January 12, 1987).

This time the Third Circuit discerned in SARA a clear Congressional intent to eliminate Eleventh Amendment immunity. Specifically, the court found that amendments to the definitional section of CERCLA, 42 U.S.C. §9601(20)(D), now made it plain that States are liable under the statute. Pet. App. 21a-23a. Aside from the language of

the amendments, the Court of Appeals found support for its conclusion in provisions eliminating the sovereign immunity of the United States and providing for citizens suits. Pet. App. 23a-28a.

Having resolved the statutory interpretation question, the Court of Appeals faced the question whether Congress had the power under the Commerce Clause to alter Eleventh Amendment protections. First, the court concluded that the extent of Congress' power to affect Eleventh Amendment immunity did not vary depending upon whether Congress was acting pursuant to its Article I powers or its power to enforce the Fourteenth Amendment. Pet. App. 66a. The court then decided that, so long as

Congress expressed itself clearly, there were no constraints on its ability to eliminate the Eleventh Amendment safeguards when it was acting under the Commerce Clause. Pet. App. 66a-67a. Finally, the court ruled that the SARA amendments could be applied retroactively because the case still was on appeal when the law was amended. Pet. App. 67a-72a.

The Court granted Pennsylvania's petition for certiorari on March 21, 1988.[4]

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[4]The Court of Appeals stayed the mandate pending disposition of this petition.

SUMMARY OF ARGUMENT

1. The Court of Appeals erred in holding that in SARA Congress acted to eliminate the States' Eleventh Amendment immunity. Congress can do so only "by making its intention unmistakably clear in the language of the statute," Atascadero State Hospital v. Scanlon, 473 U.S. 234, 242 (1985), but in SARA Congress did nothing of the kind. The language principally relied on by the Court of Appeals is far from clear, applies only in very limited circumstances, and even in those circumstances was intended to limit rather than expand government liability.

2. In any event, Congress, acting under the Commerce Clause, cannot unilaterally abrogate the Eleventh Amendment without some corresponding consent or waiver from affected States.

The cases, such as Fitzpatrick v. Bitzer, 427 U.S. 445 (1976), permitting Congress to do so when it acts under § 5 of the Fourteenth Amendment, stand on a different footing. The Fourteenth Amendment was specifically designed as an expansion of federal power over the States; when Congress acts under its Fourteenth Amendment powers, it may do things which in other contexts would be constitutionally impermissible.

Outside of the Fourteenth Amendment, the concepts of State consent and waiver have always played a central part in the Court's Eleventh Amendment jurisprudence. The Court of Appeals' decision to dispense with these concepts, in favor of a rule that Congress can do whatever it wants as long as it makes its intentions clear, makes the Eleventh Amendment meaningless except as a rule of draftsmanship.

3. Pennsylvania has not waived its Eleventh Amendment immunity. Congress may induce States to waive their immunity by notifying them, in unmistakably clear language, that State operations within a federally regulated sphere will subject them to federal court jurisdiction; such State operations are then construed as State consent to such jurisdiction. But implied consent of this kind cannot by its nature be retroactive to a point before Congress spoke, for no State could then have known the consequences of its actions. In this case, the actions complained of occurred years before SARA was enacted, so that in no event can Pennsylvania be said to have waived its immunity.

ARGUMENT

I. CONGRESS DID NOT INTEND IN CERCLA TO ELIMINATE THE STATES' ELEVENTH AMENDMENT IMMUNITY.

The Court consistently has held that "Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute." Atascadero State Hospital v. Scanlon, 473 U.S. 234, 242 (1985); Welch v. Texas Department of Highways and Public Transportation, No. 85-1716 (June 25, 1987), slip op. at 8 ("abrogation of Eleventh Amendment immunity by Congress must be expressed in unmistakably clear language"). The Court of Appeals recognized that CERCLA, as originally enacted, contains no such "unmistakably clear language," Pet. App. 97a-105a, but erroneously found it in

the SARA amendments to CERCLA. Pet. App. 21a-31a.

CERCLA authorizes the President, in cooperation with the States, to clean up releases of hazardous waste and take other remedial action, 42 U.S.C. § 9604. Any "person" who is an "owner or operator" of a hazardous waste site is liable for the costs of the remedial actions taken, by the President or anyone else, 42 U.S.C. §§ 9601(20), 9607(a), and "person" as defined in the statute specifically includes States. 42 U.S.C. §§ 9601(21).

The Court of Appeals, in its first opinion in this case, correctly held that this was not enough to overcome the Eleventh Amendment. This Court has long held that the mere literal inclusion of the States among those to whom a statute applies does not suffice

to eliminate the States' Eleventh Amendment immunity. Atascadero, supra, 473 U.S. at 245-46; Employees of Dept. of Pub. Health & Welfare v. Missouri Dept. of Public Health & Welfare, 411 U.S. 279, 283-85 (1973). This is especially so where, as here and in Employees, the statute expressly authorizes actions by the United States. 42 U.S.C. § 9607(a)(1)(A); 411 U.S. at 285-86. The Eleventh Amendment does not, of course, bar actions against a State by the United States, United States v. Mississippi, 380 U.S. 128, 140-41 (1965), so that construing such a statute to preserve the States' Eleventh Amendment immunity does not make it meaningless. Employees, 411 U.S. at 285-86. Indeed, the Court of Appeals noted that in this respect CERCLA was "almost identical" to the statute at issue in Employees. Pet. App. 100a. The Court of Appeals thus

correctly concluded that, in enacting the original CERCLA, Congress had expressed no intention to eliminate the States' Eleventh Amendment immunity.

Nothing in the SARA amendments should have changed this result, for nowhere in SARA did Congress "unequivocally express this intention," Atascadero, supra, 473 U.S. at 243. SARA makes no explicit reference to the Eleventh Amendment and does not by its terms lift the bar of immunity.

The Court of Appeals, however, focused on SARA's amendment to the definition of "owner or operator" in 42 U.S.C. § 9601(20).[5] Entitled "State or

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[5]The text of the amendment is reproduced in full at p. 3-4 of this brief. It is contained in Section 101(b) of Pub. L. No. 99-499, 100 Stat. 1613, 1615 (1986), and is codified at 42 U.S.C.A. § 9601(20)(D)(West Supp. 1988).

Local Government Limitation" (emphasis added), the amendment excludes from the definition of "owner or operator"--and hence from liability--States or local governments which have acquired hazardous waste sites involuntarily, for example through abandonment. But this exclusion is not available if the government unit "caused or contributed to the release" of the hazardous waste. "[S]uch a State or local government," that is, one which has caused or contributed to a release from a site acquired involuntarily, is subject to liability. The Court of Appeals, fastening upon this exception to the exclusion, held that Congress had thereby expressed, with the unmistakable clarity required by this Court's decisions, an intention to eliminate the States' Eleventh Amendment immunity.

The Court of Appeals was mistaken. Two things are clear about this rather convoluted provision. One is that it deals entirely with the limited circumstance of hazardous waste sites that are acquired by governments involuntarily; the other is that it was intended to limit the liability of those governments, not expand it. Nothing in the words of the statute or its legislative history suggests that Congress intended to do anything more, and certainly nothing suggests that Congress even considered the Eleventh Amendment in connection with this amendment. Cong. Rec. S11619 (daily ed. Sept. 17, 1985)(remarks of Sens. Stafford and Bentson); H.R. Conf. Rep. No. 962, 99th Cong., 2d Sess., 186-86, reprinted in 1986 U.S. Code Cong. and Adm. News 3276, 3278-79.

The Court of Appeals was able to reach the opposite result only by wrenching the last clause of the amendment ("such a State or local government shall be subject to... liability") away from the rest. Pet. App. 22a-23a. Considering this clause in isolation, the Court of Appeals concluded that Congress intended to eliminate the States' immunity from private federal lawsuits in all situations where a State "caused or contributed to the release" of hazardous waste. Ibid.

There are several problems with this approach. First, of course, is the violence that it does to the words of the statute. The clause at issue was obviously not intended to stand alone, but with the rest of the amendment which it modifies. Second, by reading this clause in isolation, the Court of Appeals

has effectively eliminated strict liability for State and local governments in all circumstances, even where the United States is a plaintiff. There is no evidence that Congress intended such a sweeping change; to the contrary, SARA's legislative history confirms that liability would continue to be "strict, that is, without regard to fault or wilfulness." H.R. Rep. No. 99-253(I) 99th Cong., 2d Sess., 74, reprinted in 1986 U.S. Code Cong. & Adm. News 2835, 2856.

Finally, and most importantly, the language relied on by the Court of Appeals does nothing, from an Eleventh Amendment perspective, to alter CERCLA as originally enacted. CERCLA, even after SARA, is still exactly like the statute considered in Employees; States

are literally included among the potential defendants, but the presence of the United States as a potential plaintiff, and the absence of any indication of a clear intention to eliminate Eleventh Amendment immunity precludes any such construction of the statute.

The Court of Appeals, to bolster its conclusion, relied on the similarity between the language of the last clause of the amendment and the language of Section 9607(g), waiving the sovereign immunity of the United States. Pet. App. 23a-24a; citing 42 U.S.C. § 9607(g). This similarity, reasoned the Court of Appeals, shows Congress' intention now to eliminate the immunity of the States as it had already eliminated that of the federal government. This reasoning, however, founders first on the fact that, as shown above, the amendment has

no broad application, and second on the fact that the amendment expressly applies not just to States but to local governments as well. Local governments, of course, do not partake of the States' Eleventh Amendment immunity, and their inclusion in a statute which, in the Court of Appeals' reading, was specifically designed to eliminate that immunity is inexplicable.

As if realizing that its reading needed still further support, the Court of Appeals looked finally to the amendment to Section 9659, which allows citizen suits under CERCLA, but only "to the extent permitted by the eleventh amendment." Pet. App. 29a-31a, citing 42 U.S.C.A. § 9659(a)(1)(West Supp. 1988). The Court of Appeals held that the recognition of Eleventh Amendment immunity for citizen suits necessarily

implies that it has been eliminated for other suits, and found this reading to be "perfectly reasonable." App. 31a.

In its first opinion, however, the Court of Appeals endorsed an alternative reading, which it also described as "perfectly reasonable," namely, that this provision had simply been copied from analogous provisions in other statutes, and was not intended to imply the general unavailability of Eleventh Amendment immunity. Pet. App. 117a-118a, n. 19. The Court of Appeals gave no reason for this astonishing about-face, but this matters little. A statute which admits of two "perfectly reasonable" but inconsistent interpretations hardly speaks with the unmistakable clarity required by this Court's Eleventh Amendment decisions.

The Court of Appeals' canvassing of the statute for hints and shades of meaning is itself evidence that its analysis has gone astray. When Congress has truly focused its attention on the Eleventh Amendment, it has had no difficulty making its intentions clear. At the same time that Congress was enacting SARA, it was also enacting the Rehabilitation Act Amendments of 1986, Pub. L. 99-506, 100 Stat. 1807 (1986).[6] Responding to the Court's decision in Atascadero, supra, this Act provides that "[a] State shall not be immune under the Eleventh Amendment from suit in Federal court for a violation of [enumerated statutes.]" Pub. L. 99-506, § 1003(a)(1), 100 Stat. at 1845. In

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[6]SARA was signed by the President on October 17, 1986, and the Rehabilitation Act Amendments five days later, on October 21.

light of the perfectly straightforward language of the Rehabilitation Act Amendments, it is absurd to suppose that in SARA Congress chose to accomplish the same thing by following the tortuous route picked out by the Court of Appeals.

The plain fact is that neither CERCLA, nor the SARA amendments to it, contains the "unmistakably clear language" required by the Court's decisions. The Court should therefore reverse the Court of Appeals.

II. CONGRESS, ACTING UNDER THE COMMERCE CLAUSE, MAY NOT UNILATERALLY ABROGATE THE ELEVENTH AMENDMENT.

If the Court holds that in SARA and CERCLA Congress did not express an unmistakable intention to eliminate the States' Eleventh Amendment immunity, the Court of course need go no further. If the Court rejects this position, however, it then becomes necessary to decide the nature and extent of Congress' power to do so. Specifically, the question is whether Congress, acting under the Commerce Clause, may abrogate the Eleventh Amendment unilaterally, that is, without any corresponding waiver or consent on the part of affected States.

The Court recently has declined to decide this question in advance of the necessity, Welch v. Texas Department of Highways and Public Transportation,

slip op. at 6; County of Oneida, New York v. Oneida Indian Nation, 470 U.S. 226, 252 (1985), but the correct answer has long been foreshadowed. The Court's Eleventh Amendment decisions repeatedly have emphasized the central role of State consent or waiver. See, e.g., Atascadero State Hospital v. Scanlon, 473 U.S. at 239-40; Edelman v. Jordan, 415 U.S. 651, 672 (1974); Monaco v. Mississippi, 292 U.S. 313, 329 (1934). This has been particularly true in cases involving statutes enacted, like this one, under Congress' Commerce Clause powers.

Thus, in Parden v. Terminal Ry. Co., 377 U.S. 184 (1964), the Court concluded that the Eleventh Amendment was not a bar to federal jurisdiction under the Federal Employees' Liability Act, 45 U.S.C. § 51 et seq., because

> Congress conditioned the right to operate a railroad in interstate commerce upon amenability to suit in federal court as provided by the Act; by thereafter operating a railroad in interstate commerce, Alabama must be taken to have accepted that condition and thus to have consented to suit.

Id. at 192. The Court explained that Congress may not at its whim make the Eleventh Amendment disappear. "It remains the law that a State may not be sued by an individual without its consent. . . Alabama, when it began operation of an interstate railway . . . necessarily consented to suit . . . ." Ibid.[7]

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[7]The particular result in Parden was overruled by Welch v. Texas Department of Highways and Public Transportation. The Court did not, however, overrule Parden's discussion of the need for State consent. The Court, instead, reserved the question. Id., slip op. at 6.

The idea that a Commerce Clause statute can eliminate Eleventh Amendment immunity only if a State can be said to have waived it by engaging in federally regulated conduct was reinforced in Employees of Dept. of Pub. Health & Welfare v. Missouri Dept. of Pub. Health & Welfare, supra. The Court noted that Congress certainly has the power to determine that activities conducted by the States have such an effect on interstate commerce as to call for a uniform national approach. Id. at 284. But it must appear clearly "that Congress conditioned the operation of these [State] facilities on the forfeiture of immunity from suit in a federal forum." Id. at 285.

Pennsylvania submits that the approach taken in Parden and Employees remains correct, and that the notion of State consent or waiver remains an essential part of any Eleventh Amendment

analysis involving a Commerce Clause statute. The Court of Appeals, however, held that Congress unilaterally may empower the federal courts to hear private actions against States whether the States consent or not, and that, provided Congress makes its intentions clear, the Eleventh Amendment does not limit Congress' power to do so. The Court of Appeals was mistaken.

1. The most glaring defect in this holding is that it drains the Eleventh Amendment of all meaning except as a rule of draftsmanship, a result that would surely have outraged the Amendment's framers. The story of the Eleventh Amendment's adoption has often been retold by the Court, e.g., Welch v. Texas Department of Highways and Public Transportation, slip op. at 10-16. The

familiar elements of that story--the concern expressed during the ratification debates, by both supporters and opponents of the Constitution, that unconsenting States not be subject to suit in the federal courts; the national uproar over the Court's decision to the contrary in Chisholm v. Georgia, 2 Dall. 419 (1793); and the "speed and vigor" with which the Nation responded by adopting the Eleventh Amendment, Welch, slip op. at 15-16, n. 17--need no re-telling here.

It is simply inconceivable, in light of this history, that its framers could have intended that the protection the Eleventh Amendment gives to States should be voidable at the whim of Congress. To paraphrase Justice Bradley:

> "Suppose that Congress, when proposing the Eleventh Amendment, had appended to it a proviso that nothing therein contained should prevent [Congress, by statute, from abrogating it]: can we imagine that it would have been adopted by the States? The supposition that it would is almost an absurdity on its face."

Hans v. Louisiana, 134 U.S. 1, 15 (1890).

The whole point of the amendment process of Article V of the Constitution is to enable the people to put certain legal principles beyond the reach of temporary majorities in the federal legislature. It is thus anomolous to suggest that Congress can override a constitutional amendment designed to limit the power of the federal government. If such a thing were suggested of any other constitutional provision--say, any of the

protections contained in the Bill of Rights--no one would seriously entertain it for a moment.

2. The Court of Appeals sought support for its holding, however, in the idea that State consent to federal jurisdiction is inherent in the constitutional plan. "By assenting to federal authority to regulate commerce, the states necessarily surrendered their sovereignty over that area," Pet. App. 62a, and thus necessarily consented to suit in federal court with respect to Commerce Clause statutes. Pet. App. 60a-65a; see Welch v. Texas Dept. of Highways and Public Transportation, slip op. at 6, n. 5.

This argument confuses the power of Congress under the Commerce Clause with the "judicial power of the United States" under Article III, and

ignores the century-old teaching of the Court in Hans v. Louisiana, supra, and other cases. Certainly, the States by ratifying the Constitution surrendered to Congress the right to regulate commerce, but they did not thereby subject themselves to federal judicial power. "The truth is, that the cognizance of suits and actions [against unconsenting States] was not contemplated by the Constitution when establishing the judicial power of the United States." Hans, 134 U.S. at 15, 16. As the Court put it in Ex parte New York, No. 1, 256 U.S. 490, 497 (1921), "the entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a State without consent given...."

3. The Court of Appeals looked also to the Court's decisions involving the interplay between the Eleventh Amendment and the Fourteenth. In Fitzpatrick v. Bitzer, 427 U.S. 445 (1976), the Court held that the Eleventh Amendment is "necessarily limited" by Congress' power under Section 5 of the Fourteenth Amendment "to enforce, by appropriate legislation, the substantive provisions of the Fourteenth Amendment." 427 U.S. at 456. "As a result, when acting pursuant to § 5 of the Fourteenth Amendment, Congress can abrogate the Eleventh Amendment without the States' consent." Atascadero State Hospital v. Scanlon, 473 U.S. at 238. The Court of Appeals reasoned that the Commerce Clause, like the Fourteenth Amendment, is a "plenary grant of constitutional authority," Pet. App. 43a, and refused to recognize any

relevant distinction between them. The Court of Appeals held that, at least as far as the Eleventh Amendment is concerned, one "plenary grant of constitutional authority" is like another; anything that Congress can do under the Fourteenth Amendment it can do also under the Commerce Clause.[8] Pet. App. 34a-47a.

Fitzpatrick v. Bitzer, supra, itself refutes this reasoning. The Court in Fitzpatrick underlined the distinction between Congress' powers under the Fourteenth Amendment and its "plenary" powers under Article I:

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[8]According to the Court of Appeals, the only difference is that Fourteenth Amendment statutes are reviewed under a relaxed standard that makes it easier to infer congressional intent to abrogate the Eleventh Amendment. Pet. App. 45a-47a.

> When congress acts pursuant to § 5, not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority.

427 U.S. at 456. The Fourteenth Amendment thus alters what would otherwise be the proper constitutional balance between federal and state governments. As the Court explained in a later decision,

> Fitzpatrick stands for the proposition that principles of federalism that might otherwise be an obstacle to congressional authority are necessarily overridden by the power to enforce the Civil War Amendments "by appropriate legislation." Those Amendments were specifically designed as an expansion of federal powers and an intrusion on state sovereignty.

City of Rome v. United States, 446 U.S. 156, 179 (1980).

It is for this reason that Congress, acting under Section 5 of the Fourteenth Amendment, may "provide for private suits against States or state officials which are constitutionally impermissible in other contexts." Fitzpatrick v. Bitzer, 427 U.S. at 156. It is likewise the reason why the Court, in Commerce Clause and other contexts outside of the Fourteenth Amendment, has routinely searched for evidence of State consent to federal court jurisdiction--a search which would be entirely superfluous if the Court of Appeals' reasoning were correct. See, e.g., Atascadero State Hospital v. Scanlon, 473 U.S. at 246-47; Edelman v. Jordan, 415 U.S. 651, 672 (1974); Parden v. Terminal Ry. Co., 377 U.S. at 192. The Court of Appeals' holding thus can draw no support from the Court's Fourteenth Amendment decisions.

4. Nor is the Court of Appeals' holding necessary to protect Congress' power to regulate commerce. The Court of Appeals believed that Congress' power could be protected only by sweeping away any real constitutional protections for the States, Pet. App. 56a-57a, but such a radical approach is hardly necessary.

The Court has always been able to accommodate the competing interests that are inherent in a federal system without sacrificing the preeminence of federal law as the "supreme law of the land," U.S. Const., Art. VI, § 2, on the one hand, or the residual sovereignty of the States on the other. See Pennhurst State School and Hospital v. Halderman, 465 U.S. 89, 104-106 (1984). Thus, a federal court may not entertain an action

against a State, nor order monetary relief against a State treasury, Edelman v. Jordan, 415 U.S. at 663, but nevertheless may vindicate "the supreme authority of the United States" by awarding an injunction ordering State officials to conform their future conduct to the requirements of federal law. Ex parte Young, 209 U.S. 123, 160 (1908). Similarly, the United States may vindicate its authority by bringing its own action, to which the Eleventh Amendment is no bar, against a State. United States v. Mississippi, supra.

Finally, as the Court has many times recognized, States may waive their Eleventh Amendment immunity, and Congress may act to induce such waivers. To this subject the petitioner now turns.

III. PENNSYLVANIA HAS NOT WAIVED ITS ELEVENTH AMENDMENT IMMUNITY

The Eleventh Amendment concepts of consent and waiver, as developed in Parden, Employees, Edelman and Atascadero, properly accommodate Congressional power exercised under Article I with the States' historic immunity. Congress, despite the Eleventh Amendment, retains the power to regulate State activities and subject the States which operate within the federally regulated domain to federal court jurisdiction. To accomplish this, Congress must make its intentions known with unmistakable clarity. Atascadero State Hospital v. Scanlon, 473 U.S. at 243.

The clear statement rule serves two purposes. First, it insures that Congress consciously has focused on the question of State immunity and resolved

it in favor of subjecting States to federal court jurisdiction. Welch v. Texas Department of Highways and Public Transportation, slip op. at 8. Secondly, consistent with "the fundamental rule of jurisprudence" that a State may not be sued without its consent," Ex Parte New York No. 1, 256 U.S. 490, 497 (1921), the clear statement requirement preserves the States' freedom of choice. The States are notified that they may maintain their sovereign protection by steering clear of the federally regulated sphere; but, if they engage in activities which Congress has chosen to regulate, the States are deemed to have consented to federal court jurisdiction. See Edelman v. Jordan, 415 U.S. at 672-673.

In this case, Pennsylvania never had a choice. The events complained of occurred between 1960 and 1980, J. App. 83a-85a, but the law purporting to eliminate State immunity was not passed until 1986. It is obviously impossible to square these events with any reasonable idea of consent or waiver on Pennsylvania's part. An implied waiver, predicated on clear notice to the affected party, by its very nature can never be retroactive to some point before the notice was given.

Therefore, even if the Court should hold that in SARA Congress spoke with unmistakable clarity, that would be entirely insufficient to subject Pennsylvania to federal court jurisdiction in this case, for events that occurred

before Congress spoke. For this reason also, the Court should reverse the decision of the Court of Appeals.

CONCLUSION

For the foregoing reasons, the petitioner asks the Court to reverse the judgment of the Court of Appeals.

Respectfully submitted,

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